Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the	)	CC Docket No. 96-115
Telecommunications Act of 1996	)	
	)	
Telecommunications Carriers Use	)	
of Customer Proprietary Network	)	
Information and Other Customer Information;	)	
	)	
Implementation of the Non-Accounting	)	CC Docket No. 96-149
Safeguards of Sections 271 and 272 of the	)	
Communications Act of 1934, As Amended	)	

COMMENTS OF THE
UNITED STATES TELECOM ASSOCIATION

Lawrence E. Sarjeant
Linda L. Kent
Keith Townsend
John W. Hunter
Julie E. Rones

Its Attorneys
1401 H Street, NW, Suite. 600
Washington, DC 20005
(202) 326-7300

November 1, 2001

TABLE OF CONTENTS

SUMMARY

USTA believes the Commission should adopt an "opt-out" consumer approval approach. It has long been on record in this proceeding as advocating for such an approach. The opt-out approach is rational, less restrictive that the opt-in" approach, sufficiently protects customer privacy and is consistent with customer expectations. The Commission had adopted an opt-out approach in the CPNI context that existed prior to the enactment of § 222. This approach was upheld by a court of law. Also, the Commission used opt-out in another context, i.e., concerning interstate Caller id. The Commission should use the established history from these instances, view the historical record evidence on opt out in this proceeding and adopt the approach. USTA believes that opt out would be lawful. USTA also believes that the Tenth Circuit vacated the Commission's CPNI rules and that a question remains and requires the Commission to take measures, on an interim basis, to ensure the viability of its Order on Reconsideration. USTA submits that the Order on Reconsideration made significant, positive modifications and should be re-adopted.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the	)	CC Docket No. 96-115
Telecommunications Act of 1996	)	
	)	
Telecommunications Carriers Use	)	
of Customer Proprietary Network	)	
Information and Other Customer Information;	)	
	)	
Implementation of the Non-Accounting	)	CC Docket No. 96-149
Safeguards of Sections 271 and 272 of the	)	
Communications Act of 1934, As Amended	)	

COMMENTS OF THE UNITED STATES TELECOM ASSOCIATION

I. INTRODUCTION

Pursuant to the October 2, 2001 *Federal Register* Notice,[1] the United States Telecom Association (USTA),[2] respectfully, submits these comments concerning the Federal Communications Commission=s (Commission or FCC) Customer Proprietary Network Information (CPNI) Clarification Order and Second Further Notice of Proposed Rulemaking.[3]

---

1 *Fed. Reg*. at 50140-50147 (Oct. 2, 2001).

2 USTA is the nations oldest trade organization representing the local exchange carrier industry. USTA represents over 800 domestic telecommunications companies that provide a full array of voice, data and video services over wireline and wireless networks. USTA has a long history of involvement in this proceeding. Its filings in CC Dkt. No. 96-115 and/or CC Dkt. No. 96-149 are incorporated herein, by reference.

3 *See* Clarification Order And Second Further Notice of Proposed Rulemaking, *In re Implementation of the Telecommunications Act of 1996, Telecommunications Carriers Use of Customer Proprietary Network Information and Other Customer Information, Federal Communications Commission* CC Dkt. No. 96-115; and, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, CC Dkt. No. 96-149, rel., Sept. 7, 2001 (Second FNPRM)..

USTA reiterates its long held viewpoint that an Aopt-out≅ comports with the requirements of Section 222(c)(1) preserves the constitutional rights of customers and service providers and is consistent with customer expectations. Accordingly, USTA requests that the Commission endorse such an approach.

II HISTORICAL BACKGROUND

The Commission established rules and regulations interpreting Section 222 of the Telecommunications Act of 1934, as Amended in 1996.[4]

Subsection 222(c)(1) states:

> Except as required by law or with the approval of the customer, a telecommunications carrier that receives or obtains customer proprietary network information [CPNI] by virtue of its provision of a telecommunications service shall only use, disclose, or permit access to individually identifiable customer proprietary network information in its provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications services, including the publishing of directories.[5]

In this subsection, Congress has created a structure in which customer approval is to be inferred for use of CPNI by telecommunications carriers. USTA advocated for an opt-out

---

[4] *See* Second Report and Order and Further Notice of Proposed Rulemaking, *in re Implementation of the Telecommunications Act of 1996; Telecommunications Carriers Use of Consumer Network Information and Other Customer Information,* CC Dkt. No. 96-115*; Implementation of Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, 63 *Fed. Reg.* 20,326 (1998)(CPNI Order).

[5] 47 U.S.C. § 222(c)(1);(emphasis added).

approach in earlier phases of this proceeding.[6] Despite the record established on this basis, the Commission established rules and regulations interpreting Section 222(c)(1) to require telecommunications companies to obtain affirmative approval from a customer before the company could use that customers CPNI for marketing purposes. The United States Court of Appeals for the Tenth Circuit (Tenth Circuit) determined that the Commission=s rules interpreting Section 222 and requiring qualified affirmative customer consent for the use of CPNI violates carriers= First Amendment, commercial speech rights under the U.S. Constitution.[7] According to the court, [t]he central provision of 222 dealing with CPNI is 222(c)(1), . . .[8] On the basis of its First Amendment analysis, the court ruled that:

> We find that the CPNI regulations interpreting the Customer approval requirement of 47 U.S.C. ə 222 (c) violate the First Amendment ... We vacate the FCCs CPNI Order, concluding that the FCC failed to adequately consider the constitutional ramifications of the regulations interpreting 222 and that the regulations violate the First Amendment.. . .The AFCC=s failure to adequately consider an obvious and substantially less restrictive alternative, an opt-out strategy, indicates that [the FCC] did not narrowly tailor the CPNI regulations regarding customer approval.[9]

(Emphasis added.) The court rendered its decision on August 18, 1999. Two days prior thereto, on August 16, 1999, the FCC had issued an Order on Reconsideration.[10]

---

6 "Comments of the United States Telephone Association" in CC Dkt. Nos. 96-115 and 96-149 (Mar. 19, 1997) at 2-3.

7 *U.S. West, Inc. v. Federal Communications Commn*, 182 F.3rd1224, 1229 (10th Cir. 1999)(*U.S. West, Inc*.).

8 *U.S. West, Inc*., 182 F.3rd at 1229.

9 *Id. at 1239.*

10 See *CPNI Order on Reconsideration*, 14 FCC Rcd 14420.

The FCC sought, but was denied a rehearing, *en banc,* by the court. The court issued the mandate on December 8, 1999.[11] The Competition Policy Institute filed a petition for *writ of certiorari* before the U.S. Supreme Court; the Commission filed a brief recommending against the Courts review of the case. The Court, subsequently, denied the petition.[12] On September 7, 2001, the Commission released a Clarification Order and Second Further Notice of Proposed Rulemaking, in CC Dkt. Nos. 96-115 and 96-149.[13]

III. DISCUSSION

A. The "Opt-Out" Approach is Rational, Less Restrictive than the "Opt-In" Approach, Sufficiently Protects Customer Privacy, and is Consistent With Customer Expectations.

The Tenth Circuit ruled that the Commission's CPNI Order could not restrict the use and disclosure of and access to customer proprietary network information by requiring telecommunications companies, in most instances, to obtain affirmative

---

11 *See* Letter from Patrick Fisher, Clerk, United States Court of Appeals, Tenth Circuit, Office of the Clerk to General Counsel, Federal Communications Commission, re: 98-9518, U S West, Inc. v. FCC Dist/Ag docket: 98-27 (Dec. 8, 1999).

12 *U.S. West, Inc. v. Federal Communications Comm'n*, 182 F.3rd 1224, *cert. denied sub nom*., *Competition Policy Inst. v. U.S. West, Inc*., 120 S. Ct. 2215, 528 U.S. 1188 (2000).

13 *In re Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information;* CC Dkt. No. 96-115; *Implementation of Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, As Amended*, CC Dkt. No. 96-149, Clarification Order and Second Further Notice of Proposed Rulemaking, FCC 01-247 (rel., Sept. 7, 2001)(Clarification Order or FNPRM); 66 Fed. Reg. 53,545 (Oct. 23, 2001)(Fed. Reg. Clarification Notice). In the Clarification notice published in the *Fed. Reg*., the FCC states its belief that the Tenth Circuit's opinion in *U. S. West, Inc.* served to strike only the customer approval requirement of section 222(c)(1). Therefore, the Commission declares that "[t]he remainder of the Commission's CPNI rules remain in effect."*Id.*

approval from a customer before the company could use that customer's CPNI for marketing purposes.[14] The majority of the court, in *U.S. West*, *Inc.* believes that the AFCC=s failure to adequately consider an obvious and substantially less restrictive alternative, an opt-out strategy, indicates that it did not narrowly tailor the CPNI regulations regarding customer approval.≅ [15] Further, the court expressed that "The government acknowledged that the means of approval could have taken numerous other forms, including an "opt-out" approach, in which approval would be inferred from the customer-carrier relationship unless the customer specifically requested that his or her CPNI be restricted."[16] In this case, the court's focus was upon "intra-carrier" as opposed to third-party uses of CPNI.[17] The Tenth Circuit's decision places the burden on the Commission Ato adequately show that an opt-out strategy would not sufficiently protect customer privacy.≅ [18]

The opt-out approach is the least restrictive approach and should be adopted. Since 1997, based on an opinion survey evaluating public attitudes toward

---

[14] *U.S. West, Inc.* 182 F.3rd at 1224.

[15] *U.S. West, Inc.,* 182 F.3rd at 1239.

[16] *U.S. West, Inc.,* 182 F.3rd 1230.

[17] *U.S. West, Inc.,* 182 F.3rd at 1233: "However, in this case, when the sole purpose of the intra-carrier speech based on CPNI is to facilitate the marketing of telecommunications services to individual customers, we find the speech integral to and inseparable from the ultimate commercial solicitation. Therefore, the speech is properly categorized as commercial speech." *Id.*

[18] *Id. at 1239.*

local telephone company use of CPNI, as performed by a widely recognized expert on consumer privacy matters, USTA has been on record, in comments filed in CC Dkt. Nos. 96-115 and 96-149, in support of an Aopt-out≅ approach.[19] USTA's position remains unchanged. USTA continues to believe that an opt-out approach would be less restrictive than an opt-in approach and would provide greater ease for companies and opportunities for consumers to learn about and procure new services and products.

This fact was also cited and supported in evidence produced by US West (now, Qwest, Inc.) on the record before the Commission; and, also as recognized by the court as a basis for the court's ultimate rejection of the Commission's opt-in approach. The Tenth Circuit opined, in pertinent part, that:

---

[19] *See, supra* note 6, regarding "Comments of the United States Telephone Association" (dated, Mar. 17, 1997) at 2-3. Therein, USTA cited to a representative national survey on issues relating to local telephone company use of CPNI information: Public Attitudes Toward Local Telephone Company Use of CPNI, Report of a National Opinion Survey Conducted Nov. 14-17, 1996, by Opinion Research Corporation, Princeton, NY, and Dr. Alan F. Westin, Columbia University, sponsored by Pacific Telesis Group. In citing this study, USTA said:

> One of the questions posed in this survey asked consumers when they are customers of a business B such as a bank, department store, insurance company, or local telephone service B do they consider it acceptable for this business to communicate with them periodically about new products or services or special discounts that may be of benefit to them. >Almost nine out of ten of the public - 88% - said receiving such informational communications **from businesses they patronize would be acceptable to them**.= The survey results also show that **almost two out of three members of the public find it acceptable for their local telephone companies to look over their customer records to extend to them additional services. This majority increases to 82% when they are offered a chance to >opt out.=** *See* AComments of the United States Telephone Association≅ (Mar. 17, 1997) at 2 & n. 1 (emphasis added). Further, USTA supplied that A[a]n opt-out procedure B one time notification to the customer of his/her CPNI rights, the CPNI use contemplated by the carrier for which approval is required, and the customer=s right to and the means to restrict such usage B is legitimate, traditional, and suitable. The notice and opt-out procedure ensures customer privacy by limiting CPNI access to those who seek such limitations and enriches the consumer choice to those who want information about new telecommunications services.≅ *Id.* at 3-4.

> US West shows that a majority of individuals, when affirmatively asked for approval to use CPNI, refused to grant it. The U.S. West study shows that 33% of those called refused to grant approval to use their CPNI, 28% granted such approval, and 39% either hung up or asked not to be called again. . .Additionally, U.S. West secured a 72% affirmative response rate from customers whom it solicited after they initiated contact with the company for some other reason. . .This study does not provide sufficient evidence that customers do not want carriers to use their CPNI. The results may simply reflect that a substantial number of individuals are ambivalent or disinterested in the privacy of their CPNI or that consumers are averse to marketing generally. The FCC stated that the study supported an equally plausible interpretation . . . that many customers value the privacy of their personal information and do not want it shared for purposes beyond the existing service relations. . .We are not convinced that the study supports the FCCs interpretation, and the FCC provides no additional evidence to bolster its argument. [Citations omitted; emphasis added.]

Aside from U. S. West and USTA, numerous other parties had advocated for an out-opt approach in earlier phases of the Commissions CPNI proceeding in CC Dkt. Nos. 96-115, 96-149. [20] Moreover, USTA, as well as a number of parties, separately, filed comments in the earlier phase of this proceeding, adopting a survey on consumer viewpoints, which supported the opt-out approach.[21] This survey, like the evidence produced by U.S. West had long been a part of the Commission's record. USTA urges

---

[20] *See*, USTA Mar. 19, 1997 comments at 2-3; *Ex parte* Letter and attachments written by Gina Harrison, Pacific Telesis Director, Federal Regulatory Relations, to William F. Caton, FCC Acting Secretary (Jan. 16, 1997) in CC Dkt. No. 96-115; *Ex parte* letter and attachment written by Gina Harrison, Pacific Telesis Director, Federal Regulatory Relations, to William F. Caton, FCC Acting Secretary (Feb. 21, 1997) in CC Dkt. No. 96-115; "Reply Comments of SBC Communications Inc. To Responses to Specific Questions" in CC Dkt. No. 96-115 at 3-6 ((Mar. 27, 1997); "Reply Comments of U.S. West, Inc." in CC Dkt. No. 96-115 (Mar. 27, 1997) at 17-18; *Ex Parte* Letter written by Robert J. Gryzmala, Attorney, Southwestern Bell Telephone to Magalie Roman Salas, FCC Secretary in CC Dkt. No. 96-115 (Dec. 24, 1997) at 2-3; and, "Further Comments of Bell Atlantic and Nynex" in CC Dkt. No. 96-115 (Mar. 17, 1997) at 3-4.

[21] *Id.*

the Commission to take cognizance of the historical record evidence supplied in this proceeding supporting the opt-out approach.

The opt-out approach is rational. The Commission has a history of recognizing consumer opt-out approaches as being in the public interest.[22] Prior to the enactment of § 222, the Commission had other rules and regulations in place concerning CPNI, in another context in which CPNI statutory underpinnings were not present. Yet, the Commission had endorsed an opt out approach in that context.[23] The CPNI rules that were the precursor to the Commission's rules established pursuant to § 222 of the Telecommunications Act of 1934, as amended, were sustained by several courts.[24] However, after the enactment of § 222, the CPNI rules existing prior thereto had to be

---

22 In the FCC's interstate caller ID proceeding, the Commission had weighed customer privacy considerations against company and consumer benefits from the service; and, consequently, allowed a form of consumer opt-out, by virtue of implementing technological requirements to allow consumers to have per-line blocking, or per-call blocking for outgoing calls. *See in re Rules and Policies Regarding Calling Number Identification Service - Caller ID,* Report and Order and Further Notice of Proposed Rulemaking, CC Dkt. No. 91-281 (adopted, Mar. 8, 1994; rel., Mar. 29, 1994)(Caller ID R&O).

23 *See in re Amendment to Sections 64.702 of the Commissions Rules and Regulations (Third Computer Inquiry); and Policy and Rules Concerning Rates for Competitive Common Carrier Service and Facilities Authorizations Thereof, Communications Protocols Under Sections 64.702 of the Commissions Rules and Regulations*, in CC Dkt. No. 85-229, Phase II, FCC 88-10, Memorandum Opinion and Order On Reconsideration, (Feb. 18, 1988) at 85-120, 146-147, 3 FCC Rcd No. 5, 1150, 1161-1165; and *FCC Public Notice,* Additional Comment Sought on Rules Governing Telephone Companies Use of Customer Proprietary Network Information," CC Dkt. Nos. 90-623, 92-256, FCC 94-63, 9 FCC Rcd No. 7 at 1685-1686 (rel., Mar. 10, 1994).

24 *See* California v. Federal Communications Comm'n, 39 F.3rd 919, 930-31 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1427 (1995); SBC Communications Inc. v. Federal Communications Comm'n, 56 F.3rd 1484, ____ (D.C. Cir. 1995)("In short, unless a customer requests that AT&T not use his CPNI, the Commission left AT&T free to use that information in its marketing of McCaw's cellular service. . . .", *id.*)

revisited because of the passage of the Telecommunications Act of 1996. [25]

In the pre-§ 222 CPNI era, the Commission recognized that an opt-out procedure provides consumers with "sufficient ability . . . to limit dissemination of [their] CPNI." [26] According to the Commission in AT&T/McCaw, "These rules permit AT&T/McCaw's long distance affiliate to provide CPNI relating to BOC cellular customers who have presubscribed to AT&T as their interexchange carrier to AT&T/McCaws cellular affiliates without prior authorization. . ."[27] These pre-§ 222, CPNI rules with the opt-out consumer consent approach were sustained by a court of law.[28] Therefore, the Commission should revert to this precedent, with respect to the opt-out approach.

The opt-out approach is acceptable to consumers. The lesson to be learned from the prior court cases, the Commission's non-statutory CPNI rules and the consumer surveys conducted independently by US West and Pacific Telesis is that the consumers, the Commission and the courts have come to treat a telecommunications carrier and its affiliates and intra-company operating units as one company; and historically have

---

25 *See in re Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards and Rules Governing Telephone Companies Use of Customer Proprietary Network Information,* CC Dkt. No. 90-623; CC Dkt. Nos. 90-623; 92-256, Order, (rel. No. FCC 96-22; rel., May 17, 1996), 11 FCC Rcd 16617-__.

26 *In re Applications of Craig O. McCaw and American Telephone and Telegraph Company,* File No. ENF-93-44*,* Memorandum Opinion and Order On Reconsideration, FCC 95-425 (rel., Oct. 30, 1995)(*AT&T/McCaw* Order on Reconsideration*),* 10 FCC Rcd 11786.

27 *In re Applications of Craig O. McCaw and American Telephone and Telegraph Company, File No. ENF-93-44,* Memorandum Opinion and Order On Reconsideration, FCC 95-425 (rel., Oct. 30, 1995)(*AT&T/McCaw* Order on Reconsideration*),* 10 FCC Rcd 11786.

28 SBC Communications Inc., 56 F.3rd 1484 (D.C. Cir. 1995).

permitted sharing of consumer information with affiliates and intra-company units as an acceptable method of allowing the consumer to do one-stop shopping to meet all of their telecommunications needs. The Tenth Circuit acknowledged the Commission's perspective on this: "By its own admission, the government is not concerned about the disclosure of CPNI within a firm. *See CPNI Order* at &55, n.203 ("[w]e agree . . . that sharing of CPNI within one integrated firm does not raise significant privacy concerns because customers would not be concerned with having their CPNI disclosed within a firm in order to receive increased competitive offerings.")[29] Carriers have not disputed that a customer's CPNI may not be shared with a third-party without the customer's consent. [30]

The opt-out approach used in the § 222 CPNI context sufficiently protects customer privacy. To the degree that consumers may have confusing notions about concepts such as "opt-out", it is important for consumers to recognize that carriers will not share their CPNI without their permission. This is essential to point out because "opt-out" now has become a much bandied-about term and has led to consumer confusion outside the context of the telecommunications industry. But this factor should not cloud the benefits that opt-out have in the context of § 222.

The Gramm-Leach-Bliley Act (GLB) "opt-out" version does not work the same way as it would in the telecommunications context. In 1999, the federal law,

---

29 *U.S. West, Inc.* 182 F.3rd at 1237 (emphasis original).

30 Citation omitted.

GLB, went into effect. That law requires a financial institution to disclose its privacy policies and practices to its customer. It also prohibits the disclosure of its customer's "non-public personal" information to non-affiliated third parties unless certain requirements are met and also requires the institution to safeguard customer records and information.[31]

One of the primary purposes of GLB, according to the Conference Report, is to enhance competition in the financial services industry by providing a framework for the affiliation of banks, securities firms, insurance companies, and other financial services providers. As a consequence of the ability of these firms from different lines of business to affiliate, customer information can be shared between and among financial services firms that opt to affiliate, unless customers "opt-out" pursuant to GLB's statutory requirements. Under GLB, these once separate financial services firms have been permitted to affiliate and share consumer information and market to the consumer. The consumer's expectations in terms of having information shared or sold and being marketed to by companies they had no previous relationship with has raised concerns in some quarters about such practices in this context. Yet, the Congress saw fit to pass GLB, and the measure was signed into law. "Opt-out" under GLB was considered to be

---

31 *See* Gramm-Leach-Bliley Act, Title V, Pub. L. No. 106-102, 113 Stat. 1338 (1999) (requires certain federal agencies to adopt rules implementing notice requirements and restrictions on the ability of financial institutions to disclose nonpublic personal information about consumers to nonaffiliated third parties. The rules promulgated pursuant to the Act also describe conditions under which a financial institution may disclose nonpublic information about a consumer and provide a method for a consumer to opt-out of the disclosure of that information. *See, e.g.* 17 CFR Part 160; 66 *Fed. Reg.* 21236 (Apr. 27, 2001).

positive for consumers and financial institutions in today's "information economy." However, consumers were required to adjust to the significant changes GLB mandated, permitting financial firms to affiliate.

Telecommunications carrier "opt-out" is consistent with consumer expectations.[32] The CPNI statute governing the telecommunications industry did not mandate either an "opt-in" or an "opt-out" approach. Similar to GLB, it requires that carriers not share consumer CPNI with third parties. That consumers may have expressed concerns with having different firms share information under GLB should not dissuade the Commission from adopting an opt-out approach here. Telecommunications consumers expect to have their carriers provide one-stop shopping opportunities. To the extent that individual firms breach the trust that has accumulated over time between telecommunications carriers and their customers, aggrieved customers have the recourse to affirmatively request the sharing of their proprietary network information be restricted.

Interstate Caller ID is another example of the Commission's authorizing an opt-out approach. The Commission had weighed consumer privacy and the benefits of allowing a new service to evolve where consumers had initially expressed reservations about privacy-infringement. The Commission had determined that permitting interstate caller ID service was in the public interest and that measures could be taken to address

32 *See Supra* note 19, citing Pacific Telesis Group sponsored opinion survey.

individual consumer concerns.[33] In that proceeding, the Commission determined that:

> [T]he availability of interstate caller ID would enhance the value of the service to intrastate subscribers and augment the available choices of existing interstate services for all subscribers . . .[34] that passage of the calling party number does create risks of lost privacy, we must weight these risks against the potential benefits brought by interstate services that passage of the calling party's number makes possible. . .[35]

Also, in the *Caller ID R&O*, the Commission recognized that consumers may have legitimate privacy concerns, but was persuaded that a greater social benefit was achieved by the availability of new services and by greater increased networks utilization.[36] However, the Commission did not ignore the need to incorporate a mechanism to afford privacy protection on an individual basis. In that regard, the Commission imposed the requirements that per-line blocking [37] and per-call blocking be made available.[38]

---

33 *See*, *In re Rules and policies Regarding Calling Number Identification Service - Caller ID,* Report and Order and Further Notice of Proposed Rulemaking, CC Dkt No. 91-281 (adopted, Mar. 8, 1994; released, Mar. 29, 1994)(Caller ID R&O*)*.

34 *See, supra* note 22, Caller ID R&O at & 4.

35 *Id. a*t & 7.

36 *Id.* at & 9.

37 *Id.* at && 39, 41.

38 Even to the extent that it could be argued that there is a low expectation of privacy in phone numbers because the information can be discovered from phone directories, the interstate caller ID example is instructive, nonetheless, because the Commission, at minimum, weighed the harms over the benefits. The Commission must identify the perceived harm and take measures to narrowly tailor any

The Commission has historically allowed consumer opt-out approaches in other context for privacy purposes and has recognized that the public interest in having interstate caller ID outweighed [39] consumer concerns about privacy.

The 10th Circuit in *U.S. West, Inc. v. FCC* said the Commission needs to address itself to the specific harm that it is seeking to protect under Section 222. [40] Thus, any consumer approval approach necessitates that the Commission take into account its historical experience in addressing consumer privacy. Both the pre-§ 222 CPNI opt-out approaches and the interstate caller ID approach serve as credible evidence to support the Commission's adoption of opt-out pursuant to § 222 of the Act.

---

approval
restriction here.

39 Even to the extent that it could be argued that there is a low expectation of privacy in phone numbers viewed by virtue of interexchange caller identification mechanisms, because the information (the phone number and name of the subscriber) can usually be discovered from phone directories or on the Internet, the caller identification example is nonetheless instructive because the Commission, at minimum, weighted the perceived harms to consumer privacy over the benefits. The Commission must identify the privacy interest first, and then fashion an appropriate remedy.

40 Specifically, the Court of Appeals for the Tenth Circuit, in *U.S. West, Inc.* said:

> [T]he government cannot satisfy the second prong of the Central Hudson test by merely asserting a broad interest in privacy. It must specify the particular notion of privacy and interest served. Moreover, privacy is not an absolute good because it imposes real costs on society. Therefore, the specific privacy interest must be substantial, demonstrating that the state has considered the proper balancing of the benefits and harms of privacy. . .In the context of a speech restriction imposed to protect privacy by keeping certain information confidential, the government must show that the dissemination of the information desired to be kept private would inflict specific and significant harm on individuals such as undue embarrassment or ridicule, intimidation or harassment, or misappropriation of sensitive personal information for the purposes of assuming another's identity. . . .Neither Congress nor the FCC explicitly states what "privacy" harm § 222 seeks to protect against. . . .While protecting against disclosure of sensitive and potentially embarrassing personal information may be important in the abstract, we have no indication of how it may occur in reality with respect to CPNI. . .The government presents no evidence regarding how and to whom carriers would disclose CPNI. By its own admission, the government is not concerned about the disclosure

The Tenth Circuit vacated the CPNI rules. The fact that the Tenth Circuit "vacated" the CPNI Order raises a question as to which of the Commission's rules, if any, survived the Tenth Circuit=s ruling. USTA believes that the Commission can remove any uncertainty as to all matters previously addressed in its CPNI Order and Order on Reconsideration, except with respect to the opt-in mechanism. It can do so by treating the Order on Reconsideration as an interim order, pending reaffirmation or modification of the Order on Reconsideration at the conclusion of this proceeding.[41] Doing so would bring a sense of certainty to carriers and consumers as the Commission completes its deliberations here.

The FCC=s CPNI Order On Reconsideration made significant, positive modifications and should be re-adopted. In its APetition for Reconsideration of the United States Telephone Association≅[42] in CC Dkt. No. 96-115 filed on May 26, 1998, USTA argued that the Commission should reconsider and modify its approach to CPNI on the bases of: 1) the limitation placed on the use of CPNI to market CPE; 2) the

---

of CPNI within a firm. . ." *U.S. West, Inc.*, 182 F.3d at __.

41 *Cf. Fed. Reg. Clarification Notice, supra* note 13 at 53,545. *See also, Mid-Tex Electric Cooperative, Inc. v. Federal Energy Regulatory Commission,* 822 F.2d 1123 (D.C. Cir. 1987)(The court allowed rules which the court vacated to stand as interim rules, until the agency could remedy the defect.); and, Jeffrey S. Lubbers, A Guide To Federal Agency Rulemaking, 3rd ed. (American Bar Association Government and Public Sector Lawyers Division and Section of Administrative Law and Regulatory Practice 1998) at 83-84.

42 APetition for Reconsideration of the United States Telephone Association≅ in CC Dkt. No. 96-115 (May 26, 1998).

limitation placed on the use of CPNI for customer retention purposes or win-back; and 3) its imposition of a costly, inefficient and overly regulatory set of CPNI safeguards applicable to telecommunications carriers. Significant, positive modifications were made by the FCC to its CPNI Order On Reconsideration. USTA continues to support those positive modifications.

Unwanted solicitations can be addressed and dealt with in the context of § 222. In *U.S. West, Inc.,* the court said: "in this case, when the sole purpose of the intra-carrier speech based on CPNI is to facilitate the marketing of telecommunications services to individual customers, *we find the speech integral to and inseparable from the ultimate commercial solicitation*. Therefore, the speech is properly categorized as commercial speech." Thus, the court felt the statute does indeed relate to solicitations.

As USTA noted from the Pacific Telesis sponsored CPNI customer survey, local telephone service exchange customers consider it acceptable for their service provider and its affiliate(s) or intra-company units to communicate with them periodically about new products or services or special discounts that may be of benefit to them. A telecommunications company acts consistent with consumers= expectations when it shares information with its affiliates or intra-company units. There is a reasonable presumption that customer solicitations made by a carrier or its affiliate and/or intra-company unit(s) to the customer are an acceptable and expected business practice. To the extent these solicitations become unacceptable, the customer can simply demand that he or she not be solicited. USTA continues to support an opt-out procedure B one time

notification to the customer of his/her CPNI rights, the CPNI use contemplated by the carrier for which approval is required, and the customer=s right to and the means to restrict such usage.[43] The notice and opt-out procedure ensures customer privacy by limiting CPNI access to those who seek such limitations and enriches the consumer choice to those who want information about new telecommunications services.[44]

IV. CONCLUSION

Telecommunications carriers respect consumer privacy. This respect is not abridged by adoption of an opt-out approach under § 222. Therefore, consistent with its comments in this matter, USTA respectfully requests that the Commission adopt an opt-out approach with respect to carriers' ability to share customer information in the § 222 context.

THE UNITED STATES TELECOM ASSOCIATION

BY: /s/ Julie E. Rones

Lawrence E. Sarjeant
Linda L. Kent
Keith Townsend
John W. Hunter
Julie E. Rones

Its Attorneys
1401 H Street, NW - Suite 600
Washington, DC 20005

43 *Second FNPRM* at ¶ 15.
44 USTA May 18, 1997 Comments at 3-4.

(202) 326-7300

November 1, 2001

CERTIFICATE OF SERVICE

I, Gail Talmadge, do hereby certify that on November 1, 2001, a copy of *Comments of the United States Telecom Association*, in CC Docket Nos. 96-115 & 96-149, was hand-delivered to the persons listed below.

/s/
Gail Talmadge

Marcy Greene, Attorney Advisor
Policy & Program Planning Division, CCB
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dorothy Attwood, Chief
Common Carrier Bureau
Federal Communications Commission
445 12th Street, SW - Room 5-C327
Washington, DC 20554

Janice Myles
Policy & Program Planning Division, CCB
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Qualex International
445 12th Street, SW - Suite CY-B402
Washington, DC 20554